

Unconstitutional "Constitutional Questions" – How Kosovo's Constitutional Court Expands its Jurisdiction

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2018-09-25T13:06:13

The Constitutional Court of Kosovo is the final authority for the interpretation of the Constitution, the compliance of acts of public authorities and the protection of human rights and freedoms. The original competences of Kosovo's Constitutional Court, i.e. its scope of jurisdiction, are laid down in Art. 113 of the Constitution of the Republic of Kosovo. Art. 113 paras. 2 and 3 provide for situations in which the Assembly of Kosovo, the Government, the Ombudsperson, and the President of Kosovo are authorized to refer matters to the Court.

On 1 July 2010, Mr. Qazim Qeska, Mayor of Rahovec, publicly addressed the citizens of the Municipality of Rahovec via *communiqué* and announced his irrevocable resignation. After his resignation, the President of the Republic of Kosovo filed a referral to the Constitutional Court of Kosovo and requested the Court to interpret which institution in the Republic of Kosovo is responsible to consider a resignation of a mayor and which are the further actions which the President should take. In a very short [judgment](#), the Court argued that the Constitution foresees under Art. 84.9 that, among others, the President of the Republic may refer constitutional questions to the Constitutional Court. Therefore the Court considered that the admissibility review under Art. 113 of the Constitution was not necessary.

In its legal reasoning, this judgment was already flawed. Art. 84.9 of the Constitution, which the Court relied on in order to examine the admissibility of the referral, merely concerns the *competencies of the President* but it does not relate to the *material jurisdiction of the Court*. The provision entitles the President to submit to the Court any "constitutional issue", but this does not absolve the Court from making a finding on its own jurisdiction pursuant to Art. 113.2 and 113.3 of the Constitution. These articles provide for a detailed list of matters the Court is competent to decide on, e.g. questions of the compatibility of laws with the Constitution (Art. 113.2.1) or conflicts among constitutional competencies between state bodies (113.3.1).

Slippery Scope of Jurisdiction

As such, the *Qeska* case would not open a discussion regarding "constitutional questions", but it served as precedent to [broaden the material jurisdiction of the Court](#). In 2011, the Government of the Republic of Kosovo submitted to the Court a *constitutional question* regarding the interpretation of the immunity of the President of the Republic, members of the Government and members of Parliament. Again,

the Court [argued](#) that the Government, among others, may refer constitutional questions to the Court based on the provision that merely defines the Government's competencies, i.e. Art. 93.10 of the Constitution. In 2014, president Jahjaga filed [another referral](#) and asked the Court to interpret if she should nominate for prime minister the candidate from the political party/coalition which has won more votes in the elections, or the candidate from the political party/coalition which represents the majority in parliament. And again, the Court based the admissibility of the referral on the provision relating to the President's competencies (Art. 84.9) rather than on Art. 113 of the Constitution.

It is noteworthy that the Court worked in parallel in three languages in every case (Albanian, Serbian and English). The Court did not explain in which language the Judge Rapporteur had prepared the preliminary reports and in which language the judgments were initially written. ¹⁾The published judgments are signed by the President of the Court and the Judge Rapporteur in all versions, see the [Albanian](#) and [English](#) version. This, however, is a rather important fact, because since the independence of Kosovo, official languages before the Constitutional Court have been Albanian and Serbian. English served as a working language for internal purposes. The Albanian version of the constitution uses the wording "çështje kushtetuse" (*constitutional issues*) whereas the English text speaks of "constitutional questions" (*pyetje kushtetuese*). This has been used to mix concepts of constitutional justice and has led to the misconceptions regarding Art. 84.9: The broader term of "constitutional issues" can in every way be understood as a description of the president's competences, not as a jurisdictional issue for the court – which is exactly what happened.

But, based on a systematic, grammatical and comparative interpretation of the constitution, these and other similarly submitted referrals by the President of the Republic or the Government should not be considered admissible because of the reasons explained above.

It appears that Kosovo's constitutional bodies utilize the Constitutional Court as a body to obtain legal advice with regard to any constitutional question that might arise. Such procedures may in fact be helpful for a young democracy. In Germany, for example, the jurisprudence of Germany's Federal Constitutional Court notes two cases when other constitutional institutions requested the Court to interpret provisions of the Basic Law (*Grundgesetz*). This procedure was known as "*Rechtsgutachten des Verfassungsgerichts*" (legal opinions of the Federal Constitutional Court) and had its legal basis in § 97 of the Law on the Federal Constitutional Court (old version). This procedure was foreseen in the early years of constitutionality in Germany and should serve as a mechanism of clarification of constitutional doubts regarding important issues of state function. It was then removed as a constitutional procedure and does not exist anymore.

In Kosovo's case, however, there is no constitutional or other legal provision that foresees this kind of procedure. The Law on the Constitutional Court of Kosovo specifies the procedures which are originally set by Art. 113 of the Constitution. Kosovo's Constitutional Court is considered a *kelsenian model of constitutional*

courts,²⁾Hasani, Enver, and I. #ukalovic. "Commentary-Constitution of the Republic of Kosovo." Prishtine, Giz (2013). p. 554 ff. and therefore has a clearly established legal basis for its function. In line with European models of constitutional justice, this serves to curb judicial activism.

Gradual Erosion of Constitutional Justice

In 2018, president Thaçi submitted two "constitutional questions" to the Court. In the first one he requested an interpretation of the concept of "parliamentary groups". And in the second one he asked the Court if international agreements have to be ratified by the parliament of Kosovo. The Constitution holds clear answers to both of these questions, but it is an attempt to strengthen his position as head of state. Being a former prime minister, he is not satisfied with being a ceremonial president, commonly known as "state notary", of a parliamentary republic.

If the Constitutional Court of Kosovo does not act as a guardian of the constitution by putting an end to this unconstitutional practice which was used in the beginnings of constitutional justice to clarify constitutional situations and to ease the functions of the newly established institutions of the young Republic of Kosovo, the concept of constitutional justice in this country will be seriously jeopardized. Constitutional Courts in countries in transition can easily be misused as a mechanism to circumvent the constitution and to legalize unconstitutional competences. Any such practice, as harmless as it may seem, which serves to legitimize an erosion of the rule of law as foreseen in the Constitution through unconstitutional methods can be a step in that direction.

References

- 1. The published judgments are signed by the President of the Court and the Judge Rapporteur in all versions, see the Albanian and English version.
- 2. Hasani, Enver, and I. #ukalovic. "Commentary-Constitution of the Republic of Kosovo." Prishtine, Giz (2013). p. 554 ff.

